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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

CATHY BURNS,

*Petitioner,*

—v.—

RICK REED,

*Respondent.*

ON WRIT OF *CERTIORARI* TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**BRIEF *AMICUS CURIAE* OF THE AMERICAN  
CIVIL LIBERTIES UNION AND THE INDIANA  
CIVIL LIBERTIES UNION IN SUPPORT  
OF PETITIONER**

Louis M. Bograd  
(*Counsel of Record*)  
Steven R. Shapiro  
American Civil Liberties Union  
Foundation  
132 West 43 Street  
New York, New York 10036  
(212) 944-9800

Richard A. Waples  
Indiana Civil Liberties Union  
445 North Pennsylvania Street  
Indianapolis, Indiana 46204  
(317) 635-4056

Linda M. Wagoner  
Fumarolo & Wagoner  
25 Merrill Lynch Plaza  
130 West Main  
Fort Wayne, Indiana 46802  
(219) 420-2525

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## INTEREST OF *AMICI*<sup>1</sup>

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 275,000 members dedicated to preserving and protecting the rights and liberties embodied in the Constitution and the Bill of Rights. The Indiana Civil Liberties Union (ICLU) is one of its statewide affiliates. In defense of those rights and liberties, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*.

The ACLU has long been concerned that victims of constitutional violations have access to legal remedies to vindicate constitutional guarantees and to provide them with redress. Civil damage actions against officials who commit constitutional violations are an important form of legal remedy for official misconduct. The effectiveness of such actions is undermined when a government official is granted immunity from civil damage liability. As this Court recognized in *Forrester v. White*, 484 U.S. 219, 223 (1988), there is an "undeniable tension between official immunities and the ideal of the rule of law." For this reason, the ACLU is concerned with any proposal to expand the scope of official immunities in derogation of the rights of victims of constitutional misconduct.

## STATEMENT OF THE CASE

On September 2, 1982, an unknown assailant entered Cathy Burns' home, knocked her unconscious with a blunt instrument, and shot her two sons in their sleep. The police officers assigned to the case decided that Burns was herself their prime suspect, despite her re-

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<sup>1</sup> Letters of consent to the filing of this brief have been lodged with the Clerk of this Court pursuant to Rule 37.3.

peated denials, as well as exculpatory results from polygraph, handwriting, and voice stress tests.

To explain this apparent inconsistency, the investigating officers decided that Burns must be a multiple personality and sought to prove their theory by questioning her under hypnosis. Because one of the officers recalled that hypnosis was an unacceptable investigative technique, the officers sought advice from respondent, the police liaison attorney in the county prosecutor's office. He advised them to go ahead with the hypnotic interrogation. Under hypnosis, Burns identified her assailant as someone named "Katie." At another point in the questioning, she also referred to herself by that name. The police officers and respondent chose to interpret this as a confession.

Respondent then brought one of the police officers before a judge to obtain a search warrant for Burns' home and car. He elicited testimony from the officer about Burns' "confession," without revealing that this was the officer's interpretation of Burns' hypnotized statements. The judge issued the search warrant on the basis of this misleading presentation. An equally misleading affidavit from another investigator led to the issuance of a warrant for Burns' arrest for attempted murder.—Following her arrest, she was held in a psychiatric ward for observation for four months. Ultimately, the doctors concluded that she was not a multiple personality, and the charges against Burns were dropped after the court learned that her alleged confession had been obtained by hypnosis. As a result of this ordeal, Ms. Burns lost her job and lost custody of her children. In addition, respondent told the press that he continued to believe her to be guilty.

Burns brought the present §1983 suit against respondent and a number of police officers. The police officers settled out of court for \$250,000 and the case proceeded to trial against respondent. At the close of

plaintiff's case, the trial court granted respondent a directed verdict on the ground that he was absolutely immune from civil damages for his conduct. The Seventh Circuit affirmed on the same ground.

### SUMMARY OF ARGUMENT

In *Imbler v. Pachtman*, 424 U.S. 409 (1976), this Court held that a state prosecutor was absolutely immune from a civil suit for damages under 42 U.S.C. §1983 for his conduct in initiating a prosecution and in presenting the state's case. The decision, however, specifically left open the question whether such absolute immunity would extend to prosecutorial misconduct in his administrative or investigatory activities. That question, at least in part, is squarely presented by the present case.

*Amici* suggest that absolute immunity should not be extended to shield such conduct. Because absolute immunity bars recovery for even the most flagrant constitutional violations, this Court has restricted its application to especially sensitive governmental functions. A prosecutor's investigatory activities do not fall into this category: They were not protected by absolute immunity at common law, and they are more akin to the functions performed by law enforcement officials subject to qualified immunity than to the conduct of judges and jurors. Absolute immunity should be limited solely to those uniquely prosecutorial functions "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. For other conduct, such as providing legal advice to police officers and obtaining a search warrant, the actions at issue in the present proceeding, state prosecutors should be provided with only the same qualified immunity that protects police officers and other executive branch officials, who can and do routinely perform similar functions. See, e.g., *Pierson v. Ray*, 386

U.S. 547 (1967); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

## ARGUMENT

### I. ABSOLUTE IMMUNITY, WHICH BARS RECOVERY FOR EVEN THE MOST FLAGRANT CONSTITUTIONAL VIOLATIONS, SHOULD BE RESTRICTED TO THOSE SPECIAL FUNCTIONS THAT REQUIRE COMPLETE PROTECTION

There is an inherent conflict between absolute immunity for official conduct and the protection of constitutional rights. As this Court has repeatedly affirmed, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); see also *Butz v. Economou*, 438 U.S. 478, 485 (1978). And, in many cases, the only meaningful remedy for a completed constitutional violation is a remedy of damages. See *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring) (in such cases, "it is damages or nothing"). See also *id.* at 395 ("[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty"); *Butz v. Economou*, 438 U.S. at 506 ("[i]n situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees"). Thus, "[t]he extension of absolute immunity from damages liability . . . [can] seriously erode the protection provided by basic constitutional guarantees." *Id.* at 505.

For this reason, this Court has been "quite sparing" in recognizing claims to absolute immunity by government officials. *Forrester v. White*, 484 U.S. 219, 224 (1988). Instead, the Court has found that a form of "qualified immunity," which protects officials from liability except for violations of "clearly established statutory or

constitutional rights," is generally sufficient to protect government officials in the exercise of their duties. See *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) ("qualified immunity represents the norm" for executive branch officials).<sup>2</sup> Recognition of such qualified immunity has allowed this Court to "avoid[] unnecessarily extending the scope of the traditional concept of absolute immunity." *Forrester v. White*, 484 U.S. at 224.

In deciding whether official conduct should be shielded by absolute as opposed to qualified immunity, this Court's rulings have not been guided by the job title of the governmental defendant.<sup>3</sup> Rather, the Court has engaged in a "functional" analysis of immunity. Under this analysis, "we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." *Forrester v. White*, 484 U.S. at 224. Moreover, the burden rests on the public official seeking absolute immunity to demonstrate that such protection is essential

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<sup>2</sup> It is important to note the substantial change in the protection afforded by qualified immunity brought about by this Court's decision in *Harlow v. Fitzgerald*. Prior to *Harlow*, an official's immunity depended in part upon his subjective belief in the legality of his actions; thus, if his good faith was disputed, qualified immunity could not be invoked until after the relevant facts had been developed at trial. See, e.g., *Imbler v. Pachtman*, 424 U.S. at 419 n.13. By contrast, under the objective standard established in *Harlow*, a court may invoke qualified immunity to dismiss a suit or grant summary judgment wherever the alleged misconduct did not violate "clearly established statutory or constitutional rights." Thus today, unlike when *Imbler* was decided, qualified immunity, like absolute immunity, can "defeat[] a suit at the outset, so long as the official's actions were within the scope of the immunity." *Imbler v. Pachtman*, 424 U.S. at 419 n.13.

<sup>3</sup> The one exception to this rule is the President, who has been held to be exempt from civil damages in all cases, due to his role in our constitutional system. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

for the proper performance of the job functions at issue. *Id.*; *Harlow v. Fitzgerald*, 457 U.S. at 812-13.

These prior rulings define the issue before the Court. The respondent in this case is not entitled to absolute immunity simply by virtue of his position as Chief Deputy Prosecutor for Delaware County. Rather, respondent bears the burden of demonstrating that qualified immunity would not adequately protect him and other prosecutors with regard to the conduct at issue in this case.

## II. STATE PROSECUTORS SHOULD BE AFFORDED ONLY QUALIFIED IMMUNITY FROM CIVIL DAMAGE LIABILITY FOR CONSTITUTIONAL VIOLATIONS COMMITTED IN THE COURSE OF THEIR INVESTIGATORY ACTIVITIES

As noted above, *Imbler v. Pachtman* established that a prosecutor is protected by absolute immunity for her conduct "in initiating a prosecution and in presenting the State's case." 424 U.S. at 431. In reaching this decision, the Court was guided by three principal considerations: a prosecutor's absolute immunity at common law to a suit for malicious prosecution, *id.* at 421-22; the analogous immunity of judges and grand jurors, *id.* at 422-24; and "the policy of protecting the judicial process." *Briscoe v. LaHue*, 460 U.S. 325, 334 (1983)(quoting *Imbler*, 424 U.S. at 439 (White, J., concurring)). None of

those rationales justify extending absolute immunity to a prosecutor's participation in investigatory activities.<sup>4</sup>

At common law, prosecutors were absolutely immune from liability for malicious prosecution and for defamatory remarks uttered in judicial proceedings. *Imbler v. Pachtman*, 424 U.S. at 437-40 (White, J., concurring). They were not, however, absolutely immune from civil liability for their investigatory conduct. Specifically, when sued for the tort of false arrest, prosecutors, like police officers, possessed only the qualified immunity afforded by the defense of "good faith and probable cause." See *Pierson v. Ray*, 386 U.S. at 555-57 (police officers entitled to qualified immunity for false arrest both at common law and under §1983); *Schneider v. Shepherd*, 158 N.W. 182 (Mich. 1916)(prosecutors not absolutely immune from suit for false arrest).<sup>5</sup> The present case, in part, raises just such a claim of unconstitutional arrest. Since Congress, in enacting §1983, did not indicate any intention to expand upon immunities available at common law, this Court has been reluctant to read into that statute immunities beyond those recognized by the common law courts of the nineteenth century. For example, in *Malley v. Briggs*, 475 U.S. 335 (1986), this Court observed: "Since the statute [§1983] on its face does not provide for *any* immunities, we

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<sup>4</sup> *Imbler v. Pachtman* expressly left unresolved the immunity of a prosecutor when acting in either an administrative or an investigatory capacity. 424 U.S. at 430. The present case addresses only the prosecutor's investigatory role. Absolute prosecutorial immunity for administrative conduct was at least implicitly rejected in *Forrester v. White*, 484 U.S. 219 (1988), which held that a judge was not absolutely immune under §1983 for actions taken in his administrative capacity.

<sup>5</sup> Prior to this Court's decision in *Imbler*, several courts of appeals had likewise held that prosecutors were not absolutely immune from suit under §1983 for initiating unconstitutional arrests. See *Imbler v. Pachtman*, 424 U.S. at 441 n.6 (White, J., concurring)(collecting cases).

would be going far to read into it an absolute immunity for conduct which was only accorded qualified immunity in 1871." *Id.* at 342 (emphasis in original).

Likewise, the analogy to the immunities granted to judges and grand jurors breaks down when a prosecutor's investigatory functions are examined. The *Imbler* decision observed that a prosecutor's decision to prosecute is comparable to the decisions required of judges and jurors: "all three officials . . . exercise a discretionary judgment on the basis of evidence presented to them." 424 U.S. at 423 n.20. Because of this "functional comparability," prosecutorial immunity was termed "quasi-judicial." *Id.*

By contrast, when a prosecutor participates in evidence-gathering activities, her role ceases to be comparable to that of a judge or jury. She is no longer engaging in the impartial weighing of evidence presented to her, but rather actively seeking additional information, either to support a position already adopted or to inform a decision she has yet to make. In these functions, the analogous actor in the criminal justice process is not the judge or juror, but the police officer. And as noted earlier, police officers receive only qualified immunity for their conduct. *Pierson v. Ray*, 386 U.S. at 555-57.

For this same reason, the policy of protecting the judicial process is not directly implicated by lawsuits seeking damages for a prosecutor's investigatory conduct. In immunizing a prosecutor's decision to prosecute, this Court sought to prevent "the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Imbler*, 424 U.S. at 423. As in other instances of absolute immunity, the principle at stake was the protection of independent, impartial decisionmaking based on appropriate criteria. *Id.* at 435 (White, J., concurring); see also *Forrester v. White*, 484 U.S. at 226 ("rationale for these decisions -- freeing the judicial

process of harassment or intimidation"). This Court feared that, because no one would sue a prosecutor for failing to indict, prosecutors would become too cautious and err too often in that direction. *Imbler*, 424 U.S. at 423-24; *id.* at 438 (White, J., concurring).

The same considerations are not present when a prosecutor renders investigatory decisions. In that role, her primary concern is to get as many facts as possible, not to weigh the pros and cons of going forward. Thus, in these areas the threat of civil damage liability becomes a valuable counterbalance to the inherent bias toward gathering ever more information; it discourages the prosecutor from acting too close to the edge of unconstitutional conduct. Cf. *Forrester v. White*, 484 U.S. at 223 (Court is "[a]ware of the salutary effects that the threat of liability can have").<sup>6</sup>

Of course, there are other policy considerations that favor protecting prosecutors from inappropriate civil damage actions: such suits are often expensive to defend and take the prosecutor away from her duties, they may result in an unjust award, and they might even discourage a court from granting habeas corpus relief for fear of exposing a prosecutor to civil liability. *Imbler*, 424 U.S. at 424-26. However, these concerns do not themselves justify absolute immunity. As explained by Justice White in his *Imbler* concurrence:

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<sup>6</sup> At the same time, the requirement that any violation be of "clearly established statutory or constitutional rights" to overcome qualified immunity will protect the prosecutor from liability for inadvertent misconduct near the margins. Cf. *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) ("the denial of absolute immunity will not leave the Attorney General at the mercy of litigants with frivolous and vexatious complaints . . . . We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law").

[T]hese adverse consequences are present with respect to suits against policemen, school teachers, and other executives, and have never before been thought sufficient to immunize an official absolutely no matter how outrageous his conduct. Indeed, these reasons are present with respect to suits against all state officials and must necessarily have been rejected by Congress as a basis for absolute immunity under 42 U.S.C. §1983, for its enactment is a clear indication that at least some officials should be accountable in damages for their official acts. Thus, unless the threat of suit is also thought to injure the governmental decisionmaking process, the other unfortunate consequences flowing from damage suits against state officials are sufficient only to extend a qualified immunity to the official in question.

424 U.S. at 436-37 (footnote omitted).

There is yet another important policy reason for limiting prosecutors to qualified immunity in connection with their investigatory responsibilities. As demonstrated by the present case, prosecutors frequently work closely with the police or other law enforcement agencies in the investigation of crimes. See Ind. Code §35-41-1-17 (Burns Supp. 1989)(defining "law enforcement officer" to include prosecuting attorneys and their deputies). In fact, in many cases the prosecutor is not only the state's advocate in court, but also its chief investigative officer. As a result, the police frequently act in accordance with guidance or directives from the prosecutor's office in conducting their investigations. It would be illogical and ironic to provide the police officers who followed the

prosecutor's instructions with only qualified immunity, while absolutely insulating the prosecutor who issued the instructions from any liability at all.<sup>7</sup> What this Court said of high, federal executive branch officials in *Butz v. Economou*, 438 U.S. 478, is thus equally true of prosecutors who direct criminal investigations:

The broad authority possessed by these officials enables them to direct their subordinates to undertake a wide range of projects -- including some which may infringe such important personal interests as liberty, property, and free speech. It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority. Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct.

*Id.* at 505-06.

In the wake of *Imbler*, the circuit courts have repeatedly been called upon to resolve cases raising the issue of prosecutorial immunity for conduct outside of the courtroom. While they have disagreed about where the line should be drawn, the courts of appeals have uniformly held that prosecutors are entitled to only qualified immunity for their investigatory or administra-

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<sup>7</sup> In fact, such a structure of immunities would place the victim of a constitutional violation in an immunity Catch 22: the prosecutor would be absolutely immune from liability, while the police officer would be able to demonstrate her good faith, and thus her entitlement to qualified immunity, by demonstrating that she abided by the prosecutor's directives.

tive conduct. See, e.g., *McSurely v. McClellan*, 697 F.2d 309, 318-19 (D.C.Cir. 1982); *Werle v. Rhode Island Bar Ass'n*, 755 F.2d 195, 198-99 (1st Cir. 1985); *Taylor v. Kavanagh*, 640 F.2d 450, 452 (2d Cir. 1981); *Forsyth v. Kleindienst*, 599 F.2d 1203, 1214-15 (3d Cir. 1979), cert. denied, 453 U.S. 913 (1981); *Allen v. Lowder*, 875 F.2d 82, 85 (4th Cir. 1989); *Marrero v. City of Hialeah*, 625 F.2d 499, 503-10 (5th Cir. 1980), cert. denied, 450 U.S. 913 (1981); *Joseph v. Patterson*, 795 F.2d 549, 553-55 (6th Cir. 1986); *Henderson v. Lopez*, 790 F.2d 44, 45-46 (7th Cir. 1986); *Smith v. Updegraff*, 744 F.2d 1354, 1364 (8th Cir. 1984); *Gobel v. Maricopa County*, 867 F.2d 1201, 1203-04 (9th Cir. 1989); *England v. Hendricks*, 880 F.2d 281, 285 (10th Cir. 1989), cert. denied, 110 S.Ct. 1130 (1990); *Marx v. Gumbinner*, 855 F.2d 783, 789 (11th Cir. 1988).

This Court has addressed the issue of the immunity of a prosecutorial authority for investigative conduct in only one, relatively unique context. In *Mitchell v. Forsyth*, 472 U.S. 511, a 4-3 majority of the Court ruled that the Attorney General of the United States was entitled to only qualified immunity for authorizing a warrantless wiretap. Because Attorney General Mitchell asserted that the wiretap was employed for national security purposes, and was not intended to facilitate any prosecutorial decision or further any criminal investigation, that decision did not reach the question of immunity for prosecutorial investigatory conduct. But the justifications for granting qualified as opposed to absolute immunity for such conduct apply with equal force to a prosecutor's investigatory functions. Therefore, *amici* urge this Court to limit the protection afforded a prosecutor in those activities to qualified immunity.

### III. THE LINE BETWEEN PROSECUTORIAL AND INVESTIGATORY CONDUCT SHOULD BE DRAWN SO AS TO LIMIT ABSOLUTE IMMUNITY TO FUNCTIONS UNIQUELY CARRIED OUT BY PROSECUTORS

Having determined that prosecutors should be entitled to absolute immunity "in initiating a prosecution and presenting the State's case," but to qualified immunity for their investigatory activity, the issue becomes one of drawing the appropriate line between these two categories of prosecutorial functions. In many instances, the line is not clear, because much prosecutorial conduct contains both investigative and prosecutorial elements. For example, in interviewing a witness, a prosecutor may be both gathering evidence and also evaluating the witness for potential trial testimony. In obtaining a search warrant after an indictment, a prosecutor may be both conducting a further investigation and preparing her case.

*Amici* suggest that the conduct subject to absolute immunity should be narrowly circumscribed: Prosecutors should be entitled to absolute immunity only with respect to those functions which are uniquely prosecutorial. Cf. *Forrester v. White*, 484 U.S. 219, 227 (1988)(need to "draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges").

A "uniquely prosecutorial function" test would serve several important policy goals. First, and most important, it would focus absolute immunity on core prosecutorial functions, those prosecutorial activities "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. Only a prosecutor is authorized to evaluate the evidence gathered in an investigation and make the decision whether to seek an indictment; only a prosecutor can present the case to a grand jury, immunize witnesses, plea bargain with defendants,

and present the state's case at trial. These are the critical, "quasi-judicial" functions that gave rise to prosecutorial immunity at common law and that motivated this Court's decision in *Imbler*.

Second, the proposed test would result in equitable treatment of different government officials engaged in comparable conduct. As noted earlier, a prosecutor's common law immunity from malicious prosecution was based in part on the "functional comparability" between her decision to initiate a prosecution and the judgments required of judges and grand jurors. See *Imbler*, 424 U.S. at 423, n.20. Similarly, when a prosecutor engages in investigatory conduct identical to that performed by other law enforcement authorities, *i.e.*, conduct that is not "uniquely prosecutorial," she should be subject to the same exposure to liability as those authorities.

Third, the proposed test is simple and clear. Lower courts have noted, with some irony, that one of the principle purposes of absolute immunity, the ability to defeat a suit at the outset without the necessity of prolonged legal proceedings, is undermined when lengthy legal proceedings become necessary to determine whether the official conduct at issue is a function to which absolute immunity applies. See, *e.g.*, *Burns v. Reed*, 894 F.2d 949, 954 n.3 (7th Cir. 1990). By focusing the court on a single question -- was the prosecutor engaged in a function only she could legally undertake -- the proposed test eliminates this problem, while preserving the focus on function, not status.

Finally, the "uniquely prosecutorial function" test resolves the disputes that have divided the lower courts by subjecting virtually all doubtful conduct to only qualified immunity. Under the principles of immunity developed by this Court, "qualified immunity represents the norm." *Harlow v. Fitzgerald*, 457 U.S. at 807. As this Court has repeatedly acknowledged, qualified immunity provides substantial protection for executive branch

officials. See, *e.g.*, *Malley v. Briggs*, 475 U.S. at 341 ("[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law"); *Mitchell v. Forsyth*, 472 U.S. at 524. And absolute immunity denies a remedy to victims of constitutional violations even in the face of willful, intentional misconduct by the government official. Therefore, absolute immunity should be reserved for only those few special functions that, by nature of their critical role in our constitutional system, require heightened protection. Prosecutorial conduct that is identical to that engaged in by other law enforcement officials does not fall into that category.

#### **IV. THE CONDUCT OF RESPONDENT AT ISSUE IN THIS PROCEEDING WAS NOT UNIQUELY PROSECUTORIAL IN NATURE AND THUS SHOULD BE ENTITLED TO ONLY QUALIFIED IMMUNITY**

Under the analysis proposed by *amici*, the final inquiry is whether the functions in which respondent engaged, giving legal advice to the police and obtaining a search warrant, were uniquely prosecutorial in nature, and thus entitled to absolute immunity. *Amici* submit that neither action was entitled to such immunity.

##### **A. Providing Legal Advice To Police Is Not A Uniquely Prosecutorial Function**

Respondent is first accused of unconstitutional conduct in advising two police officers that they should proceed with their plan to interrogate Ms. Burns, their prime suspect, under hypnosis. The court below ruled that such conduct was entitled to absolute immunity under *Imbler*. 894 F.2d at 955.

The issue of the immunity due prosecutors for dispensing legal advice to law enforcement officials has

divided the courts of appeals. Compare, e.g., *Myers v. Morris*, 810 F.2d 1437 (8th Cir.), cert. denied, 484 U.S. 828 (1987)(legal advice entitled to absolute immunity), with *Benavidez v. Gunnell*, 722 F.2d 615 (10th Cir. 1983) (legal advice subject to only qualified immunity). Courts supporting absolute immunity have offered two rationales for their position: some have reasoned that such advice, at least where it relates to the existence of probable cause, is a part of the process of deciding whether to prosecute, *Marx v. Gumbinner*, 855 F.2d at 790; others, including the court below, have analogized the prosecutor's conduct to that of a judge, because in giving legal advice she is "review[ing] the facts of a given case . . . to arrive at an opinion concerning legality," *Henderson v. Lopez*, 790 F.2d at 46. The first rationale proves too much. It is hard to imagine any prosecutorial advice to the police that could not similarly be described as a preliminary part of the ultimate decision whether to initiate a prosecution. Criminal investigations are permissible only where there is probable cause to believe a crime has been committed; thus, of necessity, they are designed to help resolve the question whether to prosecute. The second rationale rests on a flawed analogy; the key to judicial absolute immunity is not simply that judges render legal decisions, but rather that they are assigned that responsibility by our criminal justice system. Prosecutors are likewise assigned the task of deciding whether to initiate prosecutions, but the rendering of legal advice to the police is not a task mandated by our judicial process.

When viewed under the proposed "uniquely prosecutorial function" test, the issue becomes much clearer. Prosecutors are not the only persons authorized to provide legal advice to law enforcement personnel. In fact, there is a growing trend for police departments, at least in America's major cities, to have their own internal legal advisers. See International Ass'n of Chiefs of Police, *Guidelines For a Police Legal Unit* (W. Schmidt

ed. 1972)(hundreds of police departments employ one or more fulltime police legal advisers). See also Ind. Code §36-8-10-10.5(e)(Burns 1981)(statute authorizing county sheriffs to appoint a "legal deputy" as an adviser). In advising the police, a prosecutor acts not in a "quasi-judicial" role, but in the guise of a general counsel. And this Court has never suggested that general counsel, even of Cabinet departments, should be entitled to a greater degree of immunity than the government officials they serve.

The court of appeals below expressed concern at the possibility that, "if prosecutors were granted only qualified immunity from suits for conduct relating to their role as the officers' legal advisor, the end result would be to discourage prosecutors from fulfilling this vital obligation." 894 F.2d at 956. There is, in our view, a far greater likelihood that qualified immunity will have the beneficial effect of encouraging prosecutors to check the law before offering advice, thereby improving the quality of the advice given. This is in fact the purpose of the qualified immunity standard. Prosecutors, like other government officials,

may on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States. But this is precisely the point of the *Harlow* standard: "Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate . . . ."

*Mitchell v. Forsyth*, 472 U.S. at 524 (quoting *Harlow v. Fitzgerald*, 457 U.S. at 819; emphasis added in *Mitchell*). Thus, in advising the police, prosecutors should be entitled to only qualified immunity.

## B. Obtaining A Search Warrant Is Not A Uniquely Prosecutorial Function

Respondent is also accused of having improperly obtained a warrant to search Ms. Burns' home and automobile.<sup>8</sup> The court below rejected the contention that this was investigative conduct in a footnote. 894 F.2d at 955 n.6.

Again, the issue has divided the courts of appeals. For example, the D.C. Circuit has ruled that a prosecutor is entitled to only qualified immunity for the preparation of unconstitutional search and arrest warrants. *McSurely v. McClellan*, 697 F.2d 309. In a *per curiam* opinion for Judge Wald and then Judge Scalia, the court reasoned:

Similarly, preparation of the arrest and search warrants and participation in the search and seizure are nonadvocative. They involve not the protected decision to initiate prosecution, but rather the earlier, preliminary gathering of evidence which may blossom into a potential prosecution. The latter is investigatory activity and therefore receives only qualified immunity.

*Id.* at 320.

Application of the "uniquely prosecutorial function" test supports the conclusion of the D.C. Circuit. Prosecutors are not the only government officials authorized

<sup>8</sup> It is unclear from the lower court opinion whether a separate claim exists relating to respondent's conduct in obtaining a warrant for Ms. Burns' arrest. If so, the analysis in this section would apply to that claim as well. As this Court stated in *Malley v. Briggs*, 475 U.S. at 344 n.6, "the distinction between a search warrant and an arrest warrant would not make a difference in the degree of immunity accorded the officer who applied for the warrant."

to seek the issuance of a search warrant. For example, Rule 41(a) of the Federal Rules of Criminal Procedure provides that a search warrant may be requested by either "a federal law enforcement officer or an attorney for the government." The act of obtaining a search warrant is thus an essentially investigatory function which should be entitled to only qualified immunity.

The resistance of some lower courts to this conclusion can probably best be understood on the basis of the facial similarity between a judge's probable cause inquiry prior to the issuance of a warrant and later proceedings before the judge following indictment. The flaws in this analogy were exposed by this Court in *Malley v. Briggs*, 475 U.S. 335. In that case, the Court ruled that a police officer was entitled to only qualified immunity for his conduct in requesting an arrest warrant from a state judge. This Court explicitly rejected the argument that the warrant application was "intimately associated with the judicial phase of the criminal process":

We intend no disrespect to the officer applying for a warrant by observing that his action, while a vital part of the administration of criminal justice, is further removed from the judicial phase of the criminal proceedings than the act of a prosecutor in seeking an indictment. Furthermore, petitioner's analogy, while it has some force, does not take account of the fact that the prosecutor's act in seeking an indictment is but the first step in the process of seeking a conviction . . . .

In the case of the officer applying for a warrant, it is our judgment that the judicial process will on the whole benefit from a rule of qualified rather than absolute immunity. We do not believe

that the *Harlow* standard, which gives ample room for mistaken judgments, will frequently deter an officer from submitting an affidavit when probable cause to make an arrest is present. True, an officer who knows that objectively unreasonable decisions will be actionable may be motivated to reflect, before submitting a request for a warrant, whether he has a reasonable basis for believing that his affidavit establishes probable cause. But such reflection is desirable, because it reduces the likelihood that the officer's request for a warrant will be premature. Premature requests for warrants are at best a waste of judicial resources; at worst, they lead to premature arrests, which may injure the innocent or, by giving the basis for a suppression motion, benefit the guilty.

*Id.* at 342-44. The "uniquely prosecutorial function" test yields the same result for prosecutors, thus furthering one of the main purposes of this Court's functional approach to immunity, that different officials engaging in comparable conduct be treated comparably.

## CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the decision of the Seventh Circuit and remand this case for further proceedings in which respondent will be entitled only to the protection of qualified immunity.

Respectfully submitted,

Louis M. Bograd  
(*Counsel of Record*)  
Steven R. Shapiro  
American Civil Liberties Union  
Foundation  
132 West 43 Street  
New York, NY 10036  
(212) 944-9800

Richard A. Waples  
Indiana Civil Liberties Union  
445 North Pennsylvania Street  
Indianapolis, Indiana 46204  
(317) 635-4056

Linda M. Wagoner  
Fumarolo & Wagoner  
25 Merrill Lynch Plaza  
130 West Main  
Fort Wayne, Indiana 46802  
(219) 420-2525

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